

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JAY MORTON,

Cross-complainant,

Cross-defendant and Appellant,

v.

STEVEN D. BROOKS et al.,

Cross-defendants,

Cross-complainants and Appellants.

A135270

(San Francisco City & County
Super. Ct. No. CGC-07-468359)

Jay Morton was a defendant and cross-complainant in this action regarding the sale of a residence, in which he acted as the broker. Steven and Catherine Brooks and their trust (collectively, the Brooks), the sellers of the home, were also defendants and cross-complainants. Following a successful jury verdict on the plaintiffs' claims, the trial court resolved Morton's and the Brooks' cross-claims against each other in a manner largely favorable to Morton. The Brooks moved to vacate the judgment on the cross-claims and for a new trial.

In the meantime, the trial judge who had rendered decision on the cross-claims retired, and another judge was assigned to hear the Brooks' motions. The new judge resolved the motions much less favorably to Morton. Morton contends, for various reasons, that the retired judge should have been permitted to hear the motions and that the new judge erred in his rulings. In turn, the Brooks have filed a protective cross-appeal of

the original judgment. We affirm the new judge's rulings and do not reach the cross-appeal.

BACKGROUND

In 2006, plaintiffs Kathleen and Andrew Barish (the Barishes) purchased a home in the Sea Cliff neighborhood of San Francisco from the Brooks. A year later, the Barishes sued the Brooks and the broker, Morton, who had represented both buyers and sellers, in connection with alleged deficiencies in the home. The Brooks and Morton cross-claimed against each other for indemnity and other relief.¹

The Barishes' claims proceeded to jury trial in 2010 before Judge Tomar Mason. The jury found against the Brooks on claims of fraud, negligent misrepresentation, and breach of contract and against Morton on claims of negligent misrepresentation and breach of fiduciary duty. The jury set the value of the house at the time of sale at \$4.96 million and awarded damages equivalent to the difference between this value and the purchase price of \$5.5 million.

Following jury trial on their legal claims, the Barishes pursued an equitable claim for rescission against the Brooks, seeking return of the purchase price and over \$1 million in other rescission damages. In the years between the sale and the jury trial, however, the market value of the house had declined. The Brooks estimated the then-current value of the home at \$3.1 million, down \$1.86 million from the value found by the jury at the time of their purchase, and contended the Barishes should bear this loss. The parties settled their dispute in January 2011. In a confidential settlement agreement, the Brooks agreed to accept return of the house and to pay \$6.5 million dollars to the Barishes, with \$3.1 million of this allocated to the stipulated market value of the house.² Morton's counsel

¹ There were other cross-defendants as well, but they settled with the Barishes and played no role in the events relevant to the issues on this appeal.

² The settlement agreement was filed with this court under seal, but counsel for the Brooks has discussed certain of its provisions in unsealed briefing. We have attempted to disclose no more of the terms of the agreement than the Brooks' attorney.

signed, and Judge Mason entered, a stipulation and order finding the settlement agreement to have been made in good faith.

Somewhat earlier, in July and early August 2010, Judge Mason had conducted a court trial of Morton's and the Brooks' respective cross-complaints. The following year, in October 2011, Judge Mason issued a statement of decision on the cross-claims. The decision denied the Brooks' request that Morton be required to reimburse them, under the doctrine of equitable indemnity, for a portion of the rescission damages they paid to the Barishes under the settlement agreement. Notwithstanding Morton's stipulation to the good faith of the settlement, Judge Mason concluded the Brooks had failed to demonstrate the manner in which the settlement amount was allocated and reduced the amount of damages for which indemnity could be claimed from \$3.4 million to \$614,631. This residual amount was held to be offset by the depreciation of the house, which was attributed to the Brooks, reducing Morton's indemnity liability to zero. Morton was, however, required to return his commission on the sale to the Brooks under the doctrine of unjust enrichment. In addition, the Barishes were directed to pay nearly \$1 million in attorney's fees and costs to Morton under Code of Civil Procedure³ sections 998 and 1032, reduced by \$455,000 in contractual attorney's fees awarded to Morton against the Brooks. A judgment was later entered on the statement of decision. Shortly after entering the judgment, Judge Mason retired.

In February 2012, the Brooks moved to vacate the judgment on the cross-claims and for a new trial. The motion to vacate argued the material facts were not in dispute and Judge Mason erred as a matter of law in several ways, while the new trial was sought in the event the court found the material facts in conflict. The Barishes also filed a motion to vacate the judgment. In addition, on February 10, 2012, the Brooks filed a motion to disqualify Judge Mason from further hearings under section 170.1, subdivision (a)(8)(A)(ii), which precludes a judge with current or prospective work as a neutral from adjudicating a matter involving issues relating to the enforcement of an agreement to

³ Subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

submit a dispute to alternative dispute resolution. In support of the motion, the Brooks' counsel submitted a declaration stating that, although Judge Mason had retired, counsel had been informed by court personnel she would be "recalled" to hear the posttrial motions. Counsel believed disqualification was appropriate because he understood Judge Mason was discussing employment as a private dispute resolution neutral and one of the issues involved in the pending motions would be Morton's compliance with a contractual provision requiring mediation of disputes.

There is no documentation in the record of the superior court's formal response to the motion to disqualify, if any, but Judge Mason was not, in the end, recalled to hear the motions. On February 16, the Brooks filed a "Notice of Lack of Filing and Service of Opposition" to their motions in the department of Judge A. James Robertson II.⁴ There is no explanation in the record why or how counsel concluded Judge Robertson, rather than Judge Mason, would be hearing the motions.

Five days later, Morton's counsel sent a letter to Judge Robertson, stating he had received an e-mail from opposing counsel the prior day informing him the motions were scheduled for hearing on February 23 and explaining he had believed the posttrial motions had been taken off calendar by the motion to disqualify. The letter sought leave to file a joint opposition to the Barishes' and Brooks' posttrial motions and the motion to disqualify. With respect to the motion to disqualify, Morton's proposed joint opposition stated only that counsel had not heard that Judge Mason intended to take new employment. With respect to the posttrial motions, the opposition argued largely that the matters already had been ruled on by Judge Mason. In doing so, the opposition did not directly address the merits of the various substantive arguments made by the Barishes and Brooks in their motions.

On February 24, the parties appeared before yet a third judge, Judge Curtis E. A. Karnow, who scheduled hearing of the posttrial motions for March 16. Again, the record is silent regarding the apparent transfer from Judge Robertson to Judge Karnow. In a

⁴ The Brooks' motion to vacate had been noticed for hearing on February 23, 2012.

written order, Judge Karnow stated only, “[t]he case was tried by retired Judge Tomar Mason, and has been assigned to the undersigned for resolution of pending motions.” He noted the parties had told him the motions were fully briefed, and he promised a tentative ruling prior to the scheduled hearing. Three days later, Morton filed a notice of nonopposition to the Brooks’ new trial motion, stating he did not oppose the granting of a new trial and the entry of an order voiding Judge Mason’s statement of decision and judgment.

The next day, Judge Karnow sent the parties a tentative ruling by e-mail. The ruling noted that because Morton’s tardy joint opposition “does not serious[ly] address the problems [with Judge Mason’s decision] noted in the moving papers,” the motions were, in effect, “unopposed.” With respect to the Brooks’ motion to vacate the judgment, the tentative ruling found the material facts to be undisputed and not dependent upon credibility determinations. It reversed Judge Mason’s denial of indemnity, concluding it was based on “clearly erroneous” factual premises and was wrong as a matter of law. The attorney’s fee award against the Brooks was reversed on the ground Morton could no longer be regarded as the prevailing party on his cross-claims. The award of attorney’s fees against the Barishes was also reversed. The Brooks were awarded attorney’s fees, but the award was limited to work performed in connection with litigation of the cross-claims.

Faced with the unfavorable tentative ruling, Morton filed a “Motion to Return Case to Judge Tomar Mason for Post-Trial Motions . . .” and, over the course of 10 days, some six separate pleadings denoted as oppositions to various aspects of the tentative decision.⁵ Counsel for Morton also subpoenaed both Judge Mason and the Presiding Judge of the Superior Court, Honorable Katherine Feinstein, to testify at a hearing before Judge Karnow on the issue of Judge Mason’s availability. During this time, Morton also filed a petition for a writ of mandate with this court seeking an order compelling the

⁵ Most of these have not been placed in the appellate record by either party, but their filing is reflected in the trial court’s docket sheet, which is included in the respondents’ appendix.

superior court to rule on the motion to disqualify Judge Mason. The petition was summarily denied.

At a hearing on the motions, Judge Karnow first addressed Morton's motion to "return" Judge Mason and effectively denied it, telling the parties, "Judge Tomar Mason has retired. She is not enrolled in the assigned judges program. She is not a judge, to be blunt. The case cannot be assigned to her. She is, therefore, unavailable; she is not eligible to hear these motions. The presiding judge has directly informed me that these matters are assigned to me, and I am directed to decide them. [¶] This renders moot I believe all the papers involved in recusing Judge Mason." Turning to Morton's various oppositions, Judge Karnow commented, "[E]ach one of them [was] entirely unauthorized. . . . [¶] [W]hen we last met, [counsel] asked me if he could file further oppositions. . . . I told him he could not. I said it was long past the time [for] oppositions." Despite his criticism of the filing of the oppositions, Judge Karnow said he had reviewed them "very carefully . . . to see what pieces of the record he has pointed to, which I should attend carefully to in order to make sure that I understand the record as well as I can." The judge mentioned three specific factual issues on which he sought comment and heard argument.

Soon after, Judge Karnow issued a memorandum decision granting the motions to vacate the judgment, among other relief. In the decision, he reiterated his comments regarding the status of Judge Mason and reaffirmed the various rulings in his tentative ruling. The prior judgment was vacated, and the Brooks' were awarded contribution of over \$900,000, in addition to the return of Morton's commission, which had not been challenged. The court deferred decision on the amount of attorney's fees to be awarded the Brooks.⁶ In an amended statement of decision, Judge Karnow expanded on various rulings.

The trial court's docket sheet reflects the filing of a motion to vacate the judgment by Morton following issuance of these orders, but the only relevant pleading included in

⁶ A later ruling granted the Brooks \$336,000 in attorney's fees against Morton.

the appellate record is a “second supplement” to the motion, to which was attached a declaration by Judge Mason. In the declaration, the judge confirmed that she had retired on December 30, 2011, which predated the filing of the various posttrial motions. At an unspecified time, Judge Mason said she had been contacted by a court clerk to ask whether she would be willing to return to hear the posttrial motions, and she agreed to do so. The declaration does not explain why the assignment never occurred, nor does it describe any communications from the court other than that single telephone call. Judge Mason also stated she had learned a motion had been filed to disqualify her, but she was never formally served with a copy. After reviewing the motion, the judge had concluded it was without merit. The remainder of the declaration constituted a defense of the rulings that had been overturned by Judge Karnow.

Also present in the record is an order issued by Presiding Judge Feinstein striking a motion filed by Morton in May 2012 to disqualify both Judge Karnow and herself and seeking return of Judge Mason to hear the posttrial motions.⁷ In the order, the presiding judge stated that Judge Mason was unavailable because she had retired and was not a member of the court’s retired judges program. The order found no grounds to support the requested disqualifications, noting, “the entire challenge is based upon counsel’s claims that Judge Mason claims she is available, but nothing with respect to the actions or bias of this court.”

DISCUSSION

Morton has appealed the order granting attorney’s fees against him, Judge Karnow’s memorandum order, and the judgment he ultimately entered. As relief, Morton asks this court to “void” Judge Karnow’s various orders, to “reinstate” Judge Mason, to remand the matter for hearing on the Brooks’ motion to disqualify Judge Mason, and to direct a new hearing of the posttrial motions once the motion to disqualify has been decided.

⁷ The motion papers are not a part of the record.

Initially, we note that the judgment could, and perhaps should be affirmed solely on the ground that Morton has failed to provide an adequate appellate record from which we can evaluate his arguments. “It is well settled . . . that a party challenging a judgment has the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) When no adequate record is provided, “the judgment must be affirmed. [Citation.] This is so because ‘ “[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent. . . .’ [Citation.]” [Citations.]’ [Citation.] ‘The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court [erred].’ [Citation.]” (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362, original italics.)

The entire record filed by Morton is in the form of an “appendix to appellant’s opening brief,” a haphazard collection of documents that, it appears, Morton believes place his arguments in the best light. Included are the jury verdicts, Judge Mason’s declaration and statement of decision, the Brooks’ motion to disqualify, Judge Karnow’s memorandum order, statement of decision, and judgment, the transcript of the final hearing before Judge Karnow, and what appears to be the contract between the Brooks and Morton. None of the materials that would provide a background for the dispute and virtually no evidentiary materials are included. For that reason, the record is utterly inadequate to allow this court even to understand, let alone fairly rule on, Morton’s arguments. On this ground alone, the appeal could be rejected.

We refrain from affirming on that ground largely because the Brooks have filed a far more extensive respondent’s appendix from which we have been able to piece together the proceedings below. To the extent that appendix permits us to make meaningful rulings on Morton’s appellate claims, we proceed to do so.

A. Arguments Relating to Judge Mason.

Morton’s primary claim is that section 661, which governs the hearing of a motion for a new trial, required Judge Mason’s appointment to hear the posttrial motions. Under that section, a new trial motion “shall be heard and determined by the judge who presided

at the trial; provided, however, that in case of the inability of such judge . . . the same shall be heard and determined by any other judge of the same court.” A replacement judge assigned pursuant to section 661 has the same authority as the original, unavailable judge. (*Cohen v. Cohen* (1952) 110 Cal.App.2d 738, 740.)

Morton’s position is actually rejected by the only authority he cites, *Telefilm, Inc. v. Superior Court* (1949) 33 Cal.2d 289 (*Telefilm*). In *Telefilm*, the judge who conducted a jury trial died before hearing the defendant’s motion for a new trial, and another judge was assigned to the motion. The plaintiff filed a writ of mandamus to preclude a ruling on the new trial motion, contending that the death of the original trial judge did not constitute judicial “inability” for purposes of section 661 and arguing the judge’s death rendered a motion for a new trial unavailable to the defendant. The Supreme Court rejected the argument, holding that “such [a] restricted view of the statute’s wording appears to be contrary to its purport and intent to provide a comprehensive and adequate basis for the disposition of new trial proceedings.” (*Telefilm, supra*, at pp. 291–292.) Accordingly, the court held that upon the death of a trial judge, another judge of the court may be appointed to hear a motion for a new trial. Directly pertinent to our circumstances, the court noted the same rule applied “whether the cause of his inability be death or the happening of an equally significant event in life affecting his continued performance of his judicial duties, such as expiration of his term of office, *resignation or retirement from service*, disqualification, as well as some physical or mental disorder.” (*Id.* at p. 292, italics added; see similarly *Lindquist v. Superior Court* (1949) 90 Cal.App.2d 191, 193.) Under *Telefilm*, Judge Mason became unable to hear the motion upon her retirement, and the presiding judge acted pursuant to statute in assigning a sitting judge to hear the posttrial motions.

Morton argues Judge Mason should not have been deemed unable to hear the motions because she continued to be willing to do so in her retirement. *Telefilm* is to the contrary, holding that a judge becomes unavailable as a matter of law to hear the posttrial motions upon retirement. (*Telefilm, supra*, 33 Cal.2d at p. 292.) As a result, while Presiding Judge Feinstein presumably had the *discretion* to request that Judge Mason

return to hear the motions, neither section 661 nor any other rule of law *required* her to seek out Judge Mason before appointing a sitting judge. We note that there was no pressing need to recruit Judge Mason because, as Judge Karnow noted, the posttrial motions did not require the resolution of conflicts in the evidence. Intimate familiarity with the trial record was, therefore, not critical to a proper ruling.

Morton also contends that the Brooks' motion to disqualify Judge Mason was defective because it was never served on Judge Mason and was untimely. The contention is moot because there is no indication in the record that the motion to disqualify was actually ruled upon. As Judge Karnow noted in addressing Morton's "Motion to Return Case to Judge Tomar Mason for Post-Trial Motions . . . ," he was appointed to hear the posttrial motions because Judge Mason was no longer serving as a Superior Court judge, rather than because she had been disqualified, rendering a ruling on the motion to disqualify unnecessary. The presiding judge confirmed this in her order striking Morton's motion to disqualify both Judge Karnow and herself, noting "Judge Mason is retired, is not a member of the bench of San Francisco Superior Court and is not, to the court's knowledge, a participating member of the Administrative Office of the Court's Retired Judge's Program." Because there is no indication in the record that the motion to disqualify was granted as to Judge Mason, any procedural defect in the motion had no role in the rendering of judgment by Judge Karnow.⁸

Yet, even if the motion to disqualify Judge Mason had been ruled upon, we could not review that decision on appeal. The sole method for challenging a ruling on a motion to disqualify is writ review. (§ 170.3, subd. (d) ["The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal"]) Relief could be granted

⁸ Morton also claims the failure to rule on the motion to disqualify was error. Because Judge Mason was no longer a judge of the superior court when the motion was made, however, any failure to rule was harmless. Even if the motion had been denied, the presiding judge was under no legal requirement to appoint Judge Mason.

with respect to the claimed procedural errors in the making of the motion only by way of a petition for writ of mandate.

B. Arguments Relating to Judge Karnow's Rulings.

In this section, we address only the arguments made in Morton's appellant's opening brief. In his reply brief, Morton raises for the first time a wide variety of substantive challenges to Judge Karnow's rulings without providing any explanation why the arguments were not raised in his opening brief. The ordinary rule is that arguments not raised in the appellant's opening brief are waived. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1426.) Application of that rule is particularly appropriate here. As noted above, Morton provided only the most minimal appellate record. It was possible for him to make the substantive arguments in his reply brief only because he could rely on the respondent's appendix provided to support the Brooks' cross-appeal. Further, by raising the arguments for the first time in his reply brief, Morton deprived the Brooks of any opportunity to address them.⁹ To rule on them would be unfair to the Brooks, who have not been able to tell their side of the legal story. Accordingly, we reject as waived all arguments by Morton that are not addressed below.

Morton first contends Judge Karnow erred because he did not review the transcript of the trial, which did not become available until after his rulings. Morton forfeited this argument by failing to raise it below, when it could have been addressed by Judge Karnow. It is, in any event, without merit. The only authority cited by Morton, *Telefilm* again, does not support his argument. On the contrary, *Telefilm* held only that such an argument cannot be maintained in a writ of mandamus and must be raised on direct appeal from the judgment. (*Telefilm, supra*, 33 Cal.2d at p. 295.) Further, we find no statutory authority for the argument, and we note it would be an utter waste of time for a

⁹ The Brooks were permitted to file a reply brief after the filing of Morton's reply brief, but the scope of their brief was limited by rule to issues raised in their cross-appeal. (Cal. Rules of Court, rule 8.216(b)(3).) The Brooks properly respected the rule, noting in their reply brief they "are constrained from responding to [Morton's] new, untimely contentions."

trial judge to review the entire transcript of a trial when, as here, sufficiency of the evidence is not raised as a ground for relief and the issues presented are based on undisputed facts.

In addition, as the Brooks point out, section 660 provides for a variety of measures to cope with the lack of a trial transcript, including attendance of the court reporter at hearing on the motion. (See *In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 152.) By failing to take advantage of this remedy, Morton effectively conceded that the transcribed proceedings were not critical to decision of the motions. In this regard, it should be noted that, when Morton filed his tardy oppositions to the posttrial motions, Judge Karnow expressly noted that, despite rejecting the oppositions as untimely, he reviewed their references to the factual record to ensure he was aware of any evidentiary materials deemed significant by Morton. To the extent Morton raised issues of fact with Judge Karnow, the judge took notice.

Morton next contends Judge Karnow violated section 632 because he failed to rule on three motions raising the issue of recessionary relief that had been filed by Morton before Judge Mason in July 2010. Morton also forfeited this argument, both by failing to provide this court with a copy of the motions and any materials relating to their disposition and by failing to raise resolution of the motions with Judge Karnow. Under section 632, a party must file a written request for a statement of decision “specify[ing] those controverted issues as to which the party is requesting a statement of decision,” and there is no such request in the record. Morton claims he mentioned the motions in one of his six untimely oppositions, but because neither he nor the Brooks included the opposition in the appellate record, there is nothing to support this claim. In any event, the six oppositions were rejected as untimely by Judge Karnow.

We also find no merit to the argument. The motions were filed before Judge Mason prior to her rendering a judgment on the various cross-claims. To the extent the motions failed to receive a ruling, any error would have been committed by Judge Mason, not Judge Karnow, and the error should have been raised by a posttrial motion with respect to her ruling. Judge Mason’s purported failure to rule did not become an error of

Judge Karnow's merely because he was assigned to hear the posttrial motions of the other parties.

Morton next contends Judge Karnow failed to address in his statement of decision the indemnity clause in the listing agreement under which Judge Mason awarded Morton attorney's fees. This is simply a false claim. Judge Karnow acknowledged the indemnity clause, but he held it did not entitle Morton to relief in these circumstances. As Judge Karnow wrote in the memorandum order, "Morton claims contractual indemnity, but his fees appear to have been spent in defending himself—unsuccessfully—against plaintiffs' allegations of fraud and misrepresentation: indemnification of such fees would in effect indemnify Morton for his own negligence and are not shown to . . . have been within the contractual provisions at issue. [Fn. omitted.]" Yet, even if there were substance to Morton's claim, it would have been forfeited by his failure to properly raise the issue below.

Lastly, Morton contends Judge Karnow failed to follow section 877 when he did not offset the \$620,000 paid by other defendants in settlement against the amount of the Brooks' settlement for which Morton was required to provide indemnity.¹⁰ Again, we find Morton to have forfeited this argument. Judge Karnow did not directly address this issue in his rulings, but Morton failed both to make a timely argument to this effect before Judge Karnow and to request that Judge Karnow directly address the issue in his rulings.

To the extent Judge Karnow can be found implicitly to have addressed the argument and resolved it against Morton, we find no basis to conclude he erred. Under *Mullin Lumber Co. v. Chandler* (1986) 185 Cal.App.3d 1127, on which Judge Karnow expressly relied in making his indemnity award, he was required to find that the settlement amount was reasonable before granting indemnity. (*Id.* at pp. 1134–1135.) A settlement that exceeded the potential liability of the Brooks by partially or fully

¹⁰ Section 877, subdivision (a) states that a good faith settlement by less than all defendants who are jointly liable proportionately reduces the plaintiff's claims against the other defendants.

compensating the Barishes for damages already satisfied by earlier settling defendants would have been unreasonable and unworthy of indemnity. In granting indemnity, therefore, Judge Karnow implicitly found that an offset under section 877 was inappropriate. Moreover, by stipulating that the Brooks' settlement with the Barishes was made in good faith, Morton effectively agreed that the settlement did not exceed the remaining damages recoverable by the Barishes, providing support for Judge Karnow's implicit conclusion.

Because we find no merit to Morton's claims, we do not reach the Brooks' cross-appeal.

DISPOSITION

The judgment of the trial court is affirmed.

Becton, J.*

We concur:

Margulies, Acting P.J.

Dondero, J.

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.